IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

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NO. 80-6623

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CARL ALBERT COLLINS — PETITIONER

VS

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

I. Whether petitioner was denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel at the guilt and penalty phases of his capital murder trial.

II. Whether the failure of the Arkansas Supreme Court to grant petitioner an evidentiary hearing on his allegations of ineffective assistance of counsel denied him meaningful review of his sentence as guaranteed by the Due Process Clause of the Fourteenth Amendment.

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The opinion of the Supreme Court of Arkansas denying Collins permission to proceed pursuant to Ark. R. Crim. P. 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977 & Supp. 1979), is reported at Collins v. State, 271 Ark. 825, 611 S.W.2d 182 (1981). The slip opinion is filed as part of petitioner's appendix. The decisions of the Arkansas Supreme Court on direct appeal of petitioner's conviction are reported at Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975), vacated in part, 429 U.S. 808, reh. denied, 429 U.S. 966 (1976), opinion on remand, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878, reh. denied, 434 U.S. 977 (1977).

JURISDICTION

Respondent concedes that this Court has jurisdiction to review this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner has quoted the relevant provisions of the United States Constitution.

> Ark. Stat. Ann. § 41-4710 (Supp. 1973).
> Trial Procedure—Verdict in Writing. —
>
> * * *
>
> (c) In the proceeding to determine sentence, evidence may be presented as to any matters relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 11 [§ 41-4711] and 12 [§ 41-4712] of this act. The state and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.
>
> (d) After hearing all the evidence as to sentence, the jury shall again retire and render a sentence based upon the following:
>
> (i) whether beyond a reasonable doubt sufficient aggravating circumstances, as enumerated in Section 11 [§ 41-4711] of this act, exist to justify a sentence of death;
>
> (ii) whether sufficient mitigating circumstances as enumerated in Section 12 [41-4712] of this act exist to justify a sentence of life imprisonment without parole.

Ark. Stat. Ann. § 41-4711 (Supp. 1973). Aggravating Circumstances.——Aggravating circumstances shall be limited to the following:

(a) the capital felony was committed by a person under sentence of imprisonment;

(b) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) the defendant in the commission of the capital felony knowingly created a great risk of death to one (1) or more persons in addition to the victim;

(d) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(e) the capital felony was committed for pecuniary gain; and

(f) the capital felony was committed for the purpose of disrupting or hindering the lawful exercise of any governmental function, political function or the enforcement of laws.

Ark. Stat. Ann. § 41-4712 (Supp. 1973). Mitigating Circumstances.——Mitigating circumstances shall be the following:

(a) the capital felony was committed while the defendant was under extreme mental or emotional disturbance;

(b) the capital felony was committed while the defendant was acting under unusual pressures or influences, or under the domination of another person;

(c) the capital felony was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse;

(d) the youth of the defendant at the time of the commission of the capital felony; or

(e) the capital felony was committed by another person and the defendant was an accomplice or his participation relatively minor.

Ark. Stat. Ann. § 43-2725 (Repl. 1977). Matters to be Considered on Appeal. ——The Supreme Court need only review those matters briefed and argued by the appellant provided that where either a sentence for life imprisonment or death, the Supreme Court shall review all errors prejudicial to the rights of the appellant.

Respondent will not reiterate the provisions of Ark. R. Crim. P. 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977 & Supp. 1979) included in the petition. Other relevant provisions relied upon by respondent are:

Ark. R. Crim. P. 37.2. Commencement of Proceedings; Pleadings; Permission of Supreme Court Following Appeal.

* * *

(c)(Supp. 1979) A petition claiming relief under this rule must be filed in circuit court or, if prior permission to proceed is necessary as indicated in paragraph (a), in the Supreme Court within three (3) years of the date of commitment, unless the ground for relief would render the judgment of conviction absolutely void.

Ark. R. Crim. P. 37.3. Nature of Proceedings; Summary Disposition; Appointment of Counsel; Evidentiary Hearings; Presence of Petitioner.

(a) If the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files or records that are relied upon to sustain the court's findings.

Ark. Sup. Ct. R. 11, Ark. Stat. Ann. Vol. 3A (Repl. 1979).

* * *

(f) . . . When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant. Act 333 of 1971; Ark. Stat. Ann. § 43-2725 (Supp. 1973). To make that review possible the appellant must abstract all objections that were decided adversely to him in the trial court, together with such parts of the record as are needed for an understanding of the objection. The Attorney General will make certain that all objections have been so abstracted and will brief all points argued by the appellant and any other points that appear to him to involve prejudicial error.

STATEMENT OF THE CASE

Although self-serving, petitioner's statement of the case is adequate to apprise the Court of the context in which the issues are presented.

SUMMARY OF RESPONDENT'S ARGUMENT

I.

The Arkansas Supreme Court applied the proper standard of review to the allegations made in the petition filed pursuant to Ark. R. Crim. P. 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977 & Supp. 1979). The allegations that his trial counsel was ineffective were vague, conclusory and speculative. The Arkansas Court applied its standard of review to hold that none of the allegations sufficiently alleged anything more than decisions of trial counsel reflecting trial tactics, that no prejudice had been shown and that petitioner was thus not entitled to an evidentiary hearing. Since this Court has not definitely stated the federal constitutional standard to be applied to allegations of ineffective assistance, no stricter standard than that applied by the Eighth Circuit Court of Appeals should be applied here. The standard of the Arkansas Supreme Court is sufficiently analogous to that of the Eighth Circuit to withstand attack on federal constitutional grounds, and the facts found by the Arkansas Supreme Court should be given deference in applying the Eighth Circuit standard.

II.

This Court has never held that a state is required to provide any procedure for postconviction relief. Arkansas is therefore certainly not required to provide a procedure that automatically affords an evidentiary hearing without a clear showing by the petitioner that such a hearing is justified on the grounds alleged. The Arkansas Supreme Court followed the procedure specified in Rule 37 and applied the standard of review established in prior case law. Petitioner's conviction and sentence were afforded a

higher standard of review on direct appeal, as required by statute and rule, because he received the death penalty, and both the conviction and sentence were reviewed twice by the Arkansas Supreme Court on direct appeal. There is no Arkansas provision requiring the Arkansas Court to afford greater scrutiny to allegations made in a Rule 37 petition, and this Court has never held that a state is required to afford more stringent review in a postconviction proceeding, simply because the death penalty was imposed. There is thus no federal question presented.

REASONS FOR DENYING THE WRIT

I. PETITIONER WAS NOT DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL MURDER TRIAL.

Petitioner first asks this Court to review his conviction on the merits of his contention that he was "virtually without counsel" at trial because of seven (7) alleged omissions of his trial counsel. Even a cursory review of these allegations, reveals, however, that most allege omissions insignificant on their face. Others which appear to be of some significance were adequately reviewed by the Arkansas Supreme Court and found to be without merit, applying a standard which meets federal constitutional standards.

This Court has held that a defendant is entitled to effective representation of counsel, Reece v. Georgia, 350 U.S. 85, 90 (1955). The Court has noted, however, that "all advice offered by the defendant's lawyer" need not "withstand retrospective examination in a postconviction hearing." McMann v. Richardson, 398 U.S. 759, 770 (1970). In McMann, the Court held that even if the defendant's attorney erroneously evaluated the admissibility of his confession, a determination highly crucial to a decision to enter a guilty plea, the defendant was not automatically entitled to have that plea set aside. The standard stated by this Court in evaluating assistance of counsel is not "whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771. Even an erroneous conclusion by the attorney that the confession was admissible "hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective." Id. at 770. The Court also rejected the defendant's allegation that his counsel should have anticipated its decision in Jackson v. Denno, 378 U.S. 386 (1964).

Similarly, in Parker v. North Carolina, 379 U.S. 790 (1970), the defendant alleged that he entered a guilty plea based on erroneous advice from his counsel. The Court again held that

"even if Parker's counsel was wrong in his assessment of Parker's confession, it does not follow that his error was sufficient to render the plea unintelligent. . . ." The Court also found the attorney's advice "well within the range of competence required of attorneys representing defendants in criminal cases." Id. at 797.

This Court has apparently declined to elaborate definitively on the standard to be applied in evaluating effective assistance of trial counsel. See McQueen v. Swenson, 498 F.2d 207,214 (8th Cir. 1974). It has thus been left to the various Circuit Courts of Appeal to establish the standards by which each will review such allegations. Those standards range from the "farce and mockery" test to a more stringent one encompassing reasonably competent assistance, normal competency, or customary skills and diligence. Id. at 214-16.

Respondent submits that no more stringent standard should be applied here than that adopted by the Eighth Circuit Court of Appeals in United States v. Easter, 539 F.2d 663 (7th Cir. 1976), cert. denied, 434 U.S. 844 (1977). Essentially the "customary skills and diligence" test quoted above, the Eighth Circuit summarized its standard in Dupree v. United States, 606 F.2d 829, 830 (1979):

> The standard for determining the adequacy of counsel is whether the trial counsel exercised "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977). There is a presumption that counsel has rendered effective assistance. Thomas v. Wyrick, 535 F.2d 407, 413 (8th Cir.) cert. denied, 429 U.S. 868 (1976). To overcome the presumption, appellant must show that: (1) there was a failure to perform an essential duty owned [sic] by the defense attorney to his client; and (2) that the failure prejudiced the defense. McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974).

The Eighth Circuit has clearly held that the burden is on the defendant to show that the alleged error prejudiced him in obtaining a fair trial. McQueen, 498 F.2d at 219-20. It has also noted that "One challenging an attorney's exercise of professional judgment must 'shoulder a heavy burden.'" Thomas, 535 F.2d at 413.

The Eighth Circuit is "unwilling to disturb criminal convictions simply on the basis of theoretical flaws that have no real world consequences." Id. at 414.

As noted by the dissenting opinion of Judge Henley in Thomas, 535 F.2d at 419, the advancing of inadequate representation by counsel has become a "standard operating procedure" which is "most troublesome to judges and embarrassing to the attorneys involved." He also warned against "deciding cases of this kind by hindsight, on a purely ad hoc basis, and without any real reference to any particular standard of the quality of representation constitutionally required. . . ."

Respondent also submits that the Arkansas Supreme Court applies in its Rule 37 review a standard sufficiently analogous to the Eighth Circuit standard to meet constitutional muster. The standard applied in this case is set forth in the opinion, and respondent will not reiterate it here. Collins, 271 Ark. at 832-33. (The same language is found at pp. 6-7 of the slip opinion, filed as the first document in petitioner's appendix.) Respondent will note, however, that while the Arkansas Court stated its adherence to "'the mockery of justice' standard," it noted that those words are not to be "taken literally." It described the petitioner's burden to be that of "showing clearly and convincingly that his attorney was so patently lacking in competence that it became the duty of the trial court to be aware of it and to correct it." 271 Ark. at 833.

In the interest of brevity, respondent submits that the Arkansas Supreme Court properly disposed of all issues raised by petitioner in his Rule 37 petition and in his petition for writ of certiorari. The Arkansas Court's findings of fact and holding on this issue are found at 271 Ark. 833-36. (Slip opinion at 7-9.)

Respondent would comment only on allegations made by petitioner in his subparagraphs (f) and (g), both relating to the alleged burden of the petitioner of proving mitigating circumstances during the penalty phase. He cites Ark. Stat. Ann. § 41-4710 (d)(ii)(Supp. 1973) and Woodard v. State, 261 Ark. 895, 553 S.W.2d 259 (1977). Section 41-4910(d)(ii) is a portion of the superseded

statutes under which petitioner was tried, convicted and sentenced. A copy of those statutes is provided in respondent's appendix. Section 41-4710 governed the trial procedure for returning the verdict. Subsection (c) provided for the introduction of evidence at the penalty phase relating to aggravating and mitigating circumstances as enumerated in §§ 41-4711 - 4712. Subsection (d)(i) required that the jury consider whether "beyond a reasonable doubt sufficient aggravating circumstances . . . exist to justify a sentence of death." Subsection (d)(ii) required that the jury consider whether "sufficient mitigating circumstances . . . exist to justify a sentence of life without parole." The statute does not require on its face that the jury find that the mitigating circumstances outweigh the aggravating circumstances in order to justify a sentence of life without parole. The Arkansas Supreme Court has held repeatedly that the statute did not require such a finding by a jury, even when it found aggravating circumstances to exist but found no mitigating circumstances at all. See, e.g., Neal v. State, 270 Ark. 442, 449, 605 S.W.2d 421 (1980); Hulsey v. State, 261 Ark. 449, 458-60, 549 S.W.2d 73 (1977), cert. denied, 439 U.S. 882 (1978).

In fact, the Arkansas Court specifically found on direct appeal in this case:

> Although the court's instructions gave the jury the opportunity to find mitigating circumstances other than those enumerated in the statute, no such finding was made. The court also explained that the jury's decision was not to be based solely upon the number of either aggravating or mitigating circumstance, (sic) the court observing that just one mitigating circumstance might offset three or more aggravating circumstances. The ultimate issue submitted was whether the jury found beyond a reasonable doubt that sufficient aggravating circumstances existed to justify a sentence of death. We conclude that Act 438 is valid, that the issues were properly submitted to the jury, and that the verdict is sustained by the evidence.

Collins v. State, 259 Ark. 8, 13, 531 S.W.2d 13 (1975)(emphasis added).

In its second opinion in petitioner's direct appeal, after vacation of sentence and remand by this Court, the Arkansas Court stated:

> There was certainly sufficient evidence to support the jury's finding of aggravating circumstances outweighing the mitigating circumstances of appellant's youth. There was no substantial evidence which would support a finding of any other mitigating circumstance, and appellant's youth in this case deserves little weight, in the circumstances. To say the least, we are unable to find any case in which this court has reduced a death penalty where there was such a dearth of mitigating circumstance and such seriously aggravating circumstances.

Collins v. State, 261 Ark. 195, 223, 548 S.W.2d 106, cert. denied, 434 U.S. 878, reh. denied, 434 U.S. 977 (1977).

It is thus clear that the statute at issue did not require the finding alleged by petitioner. Even if it could be logically construed to mean what he contends, the Arkansas Court found on direct appeal that the trial court had instructed the jury in such a manner as to preclude any possible prejudice from the jury's weighing of aggravating and mitigating circumstances.

Further, in disposing of the issue in petitioner's Rule 37 petition corresponding to subparagraph (g) of this petition, the Arkansas Supreme Court noted that petitioner's trial counsel did in fact object to the trial court's instruction on mitigating circumstances. It quoted the trial court's response to that objection: "The matter of mitigating circumstances is an opportunity the defendant has. There is no burden on him at all. The burden is on the state in the whole case. . . ." Collins, 271 Ark. at 836.

In summary, to sustain his burden of proof, petitioner must first show with regard to at least one of his allegations that his trial counsel failed to perform some essential duty to him. He must then show that his defense was prejudiced by that omission. The Arkansas Supreme Court applied the proper standard of review when it rejected petitioner's contentions and held that he did not meet that burden.

This Court recently made clear that the lower federal courts are to give great deference to findings of fact made in the state courts, whether trial or appellate. Such findings are to be given the "presumption of correctness" embodied in and required pursuant to the mandates of 28 U.S.C. § 2254 (d)(1977). Sumner v. Mata, 28 Crim.L.Rep. (BNA) 3061 (January 21, 1981). While this obviously

applies to review when a defendant seeks a writ of habeas corpus in federal court, and while this Court is obviously not bound by Congress' intent to so limit the review of the lower federal courts, it seems only logical that this Court would also defer to the state court's findings of fact, then apply federal constitutional standards to such findings. Once the Arkansas Supreme Court's findings of fact are examined, it is clear that petitioner has not sufficiently met his burden of proving that his trial counsel was ineffective.

II. THE ARKANSAS SUPREME COURT PROVIDED CONSTITUTIONALLY ADEQUATE POSTCONVICTION REVIEW TO PETITIONER.

Petitioner alleges that he was denied his Fourteenth Amendment right to due process because the Arkansas Supreme Court denied him an evidentiary hearing in the state trial court pursuant to the Arkansas provision for postconviction relief, Ark. R. Crim. P. 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977 & Supp. 1979) (hereafter Rule 37).

At the threshold of this issue is the fact that this Court has never held that the Constitution compels the states to provide specific postconviction procedures to persons claiming violations of their federal constitutional rights. Carter v. Illinois, 329 U.S. 173 (1946). Rather, this Court has stated that though the Constitution commands the states to assure fair judgment, wide discretion is left to the states in deciding the manner of adjudicating a claim that a conviction is unconstitutional. Young v. Ragan, 337 U.S. 235, 238 (1948); Hysler v. Florida, 315 U.S. 411 (1946). As the Court stated in Carter, 329 U.S. at 175-76:

> Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . In respecting the duty laid upon them by Mooney v. Holohan, States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or coram nobis. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated. [Citations omitted.]

This philosophy was reaffirmed in Young, 337 U.S. at 238, wherein it was emphasized that "Illinois may choose the procedure it deems appropriate for the vindication of federal rights." The most revealing statement of the deference afforded states in fashioning postconviction remedies is found in Justice Jackson's concurring opinion in Brown v. Allen, 344 U.S. 443,541 (1953) (emphasis added):

> The states all allow some appeal from a judgment of conviction which permits review of any question of law, state or federal, raised upon the record. No state is obliged to furnish multiple remedies for the same grievance. Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. A state properly may deny habeas corpus to raise either state or federal issues that were or could have been raised on appeal. Such restriction by the state should be respected by federal courts.

In Hysler, an individual convicted of murder sought a writ of coram nobis from the Supreme Court of Florida which had affirmed his conviction on direct appeal three years earlier. The Florida Supreme Court refused to grant the petition. The United States Supreme Court granted certiorari on the question of whether due process had been denied the petitioner because of the alleged use of perjured testimony by the prosecution at trial. In affirming the denial of the writ, the Court found that Florida's post-conviction process met the requirements of due process.

Describing the case an "unedifying story in the administration of criminal justice," id. at 415, the Court noted that the petitioner raised his claim "after leaden-footed justice had reached the end of the familiar trail of dilatory procedure." Id. at 417. The Court held at 422:

> However ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the Court deemed the petitioner's claim without substantial foundation. We construe its finding . . . to mean that the petitioner had failed to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief.

While petitioner alleges that he finds support for his position in Case v. Nebraska, 381 U.S. 336 (1965), that case is really of little assistance to him. Although the Court was asked to decide whether the Fourteenth Amendment requires the states to afford state prisoners some corrective postconviction process, the Court found that Nebraska, in adopting a postconviction remedies statute, obviated the necessity of answering the question. This Court merely stated that postconviction remedies are "desirable." Id. at 346. Mr. Justice Brennan's concurring opinion in Case 381 U.S. at 347, makes clear that:

> There is no occasion in this case to decide whether due process requires the states to provide corrective process. The new statute (the Nebraska postconviction relief provision) on its face is plainly an adequate corrective process. Every consideration of Federalism supports our conclusion to afford the Nebraska courts the opportunity to say whether that process is available for the hearing and determination of petitioner's claim.

Petitioner has failed to raise an issue of constitutional magnitude because this Court has never held that the State equivalent of habeas corpus review is required under the United States Constitution; it has also held that where such opportunity for relief is afforded, the scope of that review and the procedure by which relief may be granted is within the discretion of the State.

Petitioner next alleges that Rule 37 is applied in a discriminatory fashion. He implies that a defendant who has foregone an appeal is automatically entitled to a hearing in the trial court. This is not, however, the case.

It is true that a defendant who has foregone an appeal may apply directly to the trial court for Rule 37 relief. Rule 37.1(d). Rule 37.3 provides, however, that the trial court may determine from the files and records of the case that the defendant is not entitled to relief without holding an evidentiary hearing. The trial court then makes written findings reviewable by the Arkansas Supreme Court.

Despite the allegations of petitioner, there is simply no difference between the trial court's review of the files and records and the entering of written findings and the Arkansas Supreme Court's written findings in this case. In short, there is no unconditional right pursuant to Rule 37 to an evidentiary hearing in the trial court, whether the defendant originally prosecuted an appeal or not. Any right granted is based on the substance and strength of the grounds alleged.

Petitioner filed his Rule 37 petition pursuant to Rule 37.2 (a) after having already prosecuted a direct appeal to the Arkansas Supreme Court. That provision requires the permission of the Arkansas Supreme Court before the defendant may return to the trial court with his contentions. The logical purpose of this

provision is obvious: Rule 37 is designed to afford the opportunity for relief to those defendants who have not otherwise had an opportunity for review of the claims of constitutional deprivation. It is not intended as a second appeal procedure. Collins, 271 Ark. at 828.

In support of the proposition that this Court will order hearings held so that defendants may develop factual allegations in hearings in State courts, petitioner cites Wilde v. Wyoming, 362 U.S. 607 (1960); Sublett v. Adams, 362 U.S. 143 (1960); Palmer v. Ashe, 342 U.S. 134 (1952). He also cites Mooney v. Holohan, 294 U.S. 103 (1935) for the proposition that the State court is the proper forum for such hearings.

Again, petitioner's reliance is misplaced. Mooney essentially dealt with exhaustion of State remedies before allowing a defendant to proceed with a federal writ of habeas corpus. It is interesting to note that the Court held in Mooney, 294 U.S. at 115, that, before a federal writ will issue, "recourse should be had to whatever judicial remedy afforded by the State may still remain open." (Emphasis added.) There is no requirement that such a remedy be afforded, much less a requirement as to what form that opportunity for relief must take.

In Wilde, Sublett and Palmer, the defendants alleged that they had entered guilty pleas without representation by counsel. There was apparently no direct appeal taken by any of those three defendants. The Court noted in Wilde that there was nothing in the record to justify denial of a hearing. In Sublett, the Court relied on its earlier holding in Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956). That case also involved allegations of a coerced and uncounseled guilty plea, and the Court found that the defendant's allegations were not patently frivolous or false concerning matters not in the record and that a hearing could not be denied simply because the prosecutor denied some of the allegations.

While it is true that the Court found the defendants entitled to hearings in State court in these cases, its reasoning is not applicable here. There is very little analogy to be drawn

between a contention that a defendant has entered a coerced guilty plea without counsel and with no prior appellate review and the weak, insubstantial and conclusory allegations made here by petitioner several years after his conviction has been twice thoroughly reviewed and affirmed.

Petitioner objects to what he describes as the Arkansas Supreme Court's "assumptions" with regard to his allegations of ineffective assistance of counsel. The fact is, however, that petitioner's allegations were based on assumption, self-serving conclusions unsupported by facts either in or outside the record and speculation. He did not present the Arkansas Supreme Court with sufficient information to squarely raise any factual issues worthy of the time and expense of a hearing.

Petitioner continues to argue that the fact that the death penalty was imposed in his case warrants a different standard of review. This is true to some extent. The Arkansas Supreme Court affords a much more stringent review on appeal of death penalty cases, both by statute and rule. Ark. Stat. Ann. §43-2725 (Repl. 1977); Ark. Sup. Ct. R. 11(f), Ark. Stat. Ann. Vol. 3A (Repl. 1979). See also Collins v. State, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U. S. 878, reh. denied, 434 U.S. 977 (1977). Section 43-2725, which was in effect when petitioner was tried, provides that in such cases, the Arkansas Supreme Court "shall review all errors prejudicial to the rights of the appellant." This has been construed by the Arkansas Court to mean "that this mandated review required an examination of the trial record, even though the objectionable action which might be reversible error was not argued on appeal in any way." Collins, 261 Ark. at 216.

Pursuant to a prior similar statute, the Arkansas Court has, in at least four cases, reversed convictions involving the imposition of the death penalty on issues raised neither at trial nor on appeal. Walton v. State, 232 Ark. 86, 334 S.W.2d 657 (1960); Alford v. State, 223 Ark. 330, 332, 266 S.W.2d 804 (1954); Smith v. State, 205 Ark. 1075, 172 S.W.2d 249 (1943); Webb v. State, 154 Ark. 67, 242 S.W. 380 (1922). See also Gruzen v. State, 267 Ark. Adv. Sh. 380, 591 S.W.2d 342 (1979), cert. denied, No. 79-6613 (U.S. Oct. 9, 1980).

Petitioner alleges that Rule 37 provides a "mere form" offered by the State of Arkansas instead of a substantive procedure offering meaningful review. He implies that relief pursuant to Rule 37 is denied arbitrarily by the Arkansas Supreme Court unless error is conceded by the Attorney General. A brief review of cases indicates, however, that this is not true.

In Scott v. State, 267 Ark. Adv. Sh. 536, 592 S.W.2d 122 (1980), petitioner was denied relief on his second petition under Rule 37, which was filed more than three years after his commitment. Although the filing was clearly barred under Rule 37.2(b) as a subsequent petition and under Rule 37.2(c) as untimely, the court still implied that it would "go behind the rule" if petitioner had been able to "clearly demonstrate manifest injustice resulting from his several opportunities for redress." 267 Ark. at 538.

In Irons v. State, 267 Ark. Adv. Sh. 469, 591 S.W.2d 650 (1980), the court reversed the trial court's denial of Rule 37 relief (and the conviction) on grounds not even raised on the appeal from the denial. Although there was a "mysterious abandonment" of virtually all grounds of the petition on appeal, the court found the one argument raised to be "broader than the point stated," reviewed the record and found reversible error. 267 Ark. at 471.

In Walker v. State, 251 Ark. 182, 471 S.W.2d 536 (1971), appeal after remand, 254 Ark. 1072, 497 S.W.2d 258 (1973), the court reiterated its rule that postconviction relief is available to afford relief to a defendant who was insane at the time of his trial or sentence if the fact was not made known to the trial court, even if his allegation was "ineptly stated." 251 Ark. at 185. The court further held that the Arkansas provisions for postconviction relief were adopted "to avoid technical niceties in existing procedures." 251 Ark. at 186.

The Arkansas Supreme Court reviewed petitioner's allegations, made findings of fact based on the record and found that he did not raise issues requiring an evidentiary hearing. That holding was firmly based on prior interpretation of the purpose and scope of Rule 37 review, as well as on the substance of the allegations themselves. Petitioner is not entitled to more.

CONCLUSION

The Arkansas Supreme Court reviewed petitioner's allegations regarding the ineffective assistance of his trial counsel and made findings of fact. It applied a standard of review which meets the federal standard applied by the Eighth Circuit Court of Appeals and thus met federal constitutional requirements. A writ of certiorari should not be granted on the first question raised by petitioner because there is no question of law sufficient to meet the criteria of Rule 17 of this Court.

Petitioner has failed to raise an issue of the denial of due process because of the Arkansas Supreme Court's refusal to grant him an evidentiary hearing on his allegations. This Court has never held that State courts must afford any postconviction review or relief; it has certainly not held that such review must take the form of an evidentiary hearing.

Petitioner's conviction has now been reviewed three times by the Arkansas Supreme Court. A higher standard of review was required and applied on direct appeal because the death penalty was imposed. Petitioner was afforded constitutionally adequate review of the conclusory and speculative allegations raised in his Rule 37 petition. The Arkansas Court properly found no constitutional deprivation and afforded him no relief.

The findings of the Arkansas Court with regard to the merits of his allegations of ineffective assistance of counsel should be given deference by this Court, and there is no basis in federal constitutional law for finding that the scope of Rule 37 review was constitutionally inadequate.

This Court should therefore deny the petition for writ of certiorari.

Respectfully submitted,

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Supp 1973

41-4701. Categories of felonies.—Felonies are classified for the purpose of sentence, and for any other purpose specifically provided by law, into the following categories:

(a) capital felony;
(b) life felony without parole;
(c) life felony; and
(d) felony. [Acts 1973, No. 438, § 1, p. —.]

41-4702. Capital felonies—Definitions.—The following crimes shall be capital felonies punishable as provided in Section 6 [§ 41-4706] hereof:

(A) the unlawful killing of a human being when committed by a person engaged in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, kidnaping, or mass transit piracy;

(B) any person convicted of treason as now defined by law;

(C) the unlawful killing of a policeman or any other law enforcement officer, jailer, prison guard or any other prison official, fireman, a judge or any other court official, probation officer, parole officer, military personnel, when any such person so killed is acting in the line of duty, and when such killing is perpetrated from a premeditated design to effect the death of the person killed or of any other human being;

(D) the unlawful killing of two (2) or more human beings when perpetrated from a premeditated design in the course of the same act to effect the death of the persons killed or any other human being;

(E) the unlawful killing of any public official or any candidate for public office from a premeditated design to effect the death of the person killed or of any other human being; and

(F) the unlawful killing of any person by a person who is already under sentence of death or of life in the penitentiary.

As used in subsection (A) of this section, the term "mass transit piracy" shall mean the seizing or exercising of control by force or threat of violence, without lawful authority and with wrongful intent, of any vehicle with a seating capacity of more than eight (8) passengers operated by a common or contract carrier of passengers for hire, containing a non-consenting person or persons within this State.

As used in this Act [§§ 41-4701—41-4716], the term "public official" as used in subsection (E) of this section, shall mean any person holding a public office which, under the constitution or laws of this State, is filled by election. [Acts 1973, No. 438, § 2, p. —.]

41-4703. Life felony without parole.—When any person shall be convicted of any capital felony listed in Section 2 [§ 41-4702] hereof, and the jury in its discretion finds mitigating circumstances as set forth in Section 12 [§ 41-4712] and determines that these mitigating circumstances preclude the imposition of death by electrocution, then such crime shall be a life felony without parole and shall be punishable as provided in Section 7 [§ 41-4707] hereof. [Acts 1973, No. 438, § 3, p. —.]

41-4704. Life felonies.—All other offenses for which life imprisonment or death in the electric chair is presently prescribed by Arkansas law shall be life felonies and shall be punishable as provided in Section 8 [§ 41-4708] hereof. [Acts 1973, No. 438, § 4, p. —.]

41-4705. Felonies.—Any other crime now or hereafter punishable by imprisonment for a term of years in the Arkansas State Penitentiary shall be a felony. [Acts 1973, No. 438, § 5, p. —.]

41-4706. Conviction of capital felonies—Punishment.—A person convicted of a capital felony shall be punished by death by electrocution or by life imprisonment without parole as provided in Section 10 [§ 41-4710] hereof. [Acts 1973, No. 438, § 6, p. —.]

Section to Section Reference.

This section is referred to in § 41-4702.

41-4707. Conviction of life felony without parole—Punishment.—A person convicted of a life felony without parole shall be imprisoned in the Arkansas State Penitentiary for the remainder of his life and shall not be released except pursuant to a commutation, pardon, or reprieve of the Governor, conducted and granted in accordance with Section 14 [§ 41-4714] hereof. [Acts 1973, No. 438, § 7, p. —.]

Section to Section Reference.

This section is referred to in § 41-4703.

41-4708. Conviction of life felony—Punishment.—A person convicted of a life felony shall be imprisoned in the State Penitentiary for the remainder of his life and shall not be released except pursuant to a commutation, pardon, or reprieve of the Governor or pursuant to parole procedures now or hereafter established by law. [Acts 1973, No. 438, § 8, p. —.]

Section to Section Reference.

This section is referred to in § 41-4704.

41-4709. Conviction of felony—Punishment.—A person convicted of a felony shall be punished by a fine and/or imprisonment in the Arkansas State Penitentiary as may now or hereafter be provided by law. [Acts 1973, No. 438, § 9, p. —.]

41-4710. Trial procedure—Verdict in writing.—A person charged with a capital felony shall be given a jury trial and sentenced pursuant to the following procedure:

(a) After presentation of all evidence and witnesses to be offered by the State and/or the defendant as to the guilt or innocence of the defendant, instructions to the jury, and argument by counsel, the jury shall retire and consider the case.

(b) If the jury finds the defendant guilty of a capital felony, the same jury shall sit again to determine whether the defendant shall be sentenced to death or life imprisonment without parole.

(c) In the proceeding to determine sentence, evidence may be presented as to any matters relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 11 [§ 41-4711] and 12 [§ 41-4712] of this act. The State and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.

(d) After hearing all the evidence as to sentence, the jury shall again retire and render a sentence based upon the following:

(i) whether beyond a reasonable doubt sufficient aggravating circumstances, as enumerated in Section 11 [§ 41-4711] of this act, exist to justify a sentence of death;

(ii) whether sufficient mitigating circumstances as enumerated in Section 12 [§ 41-4712] of this act exist to justify a sentence of life imprisonment without parole.

(e) The jury in rendering its verdict shall set forth in writing its findings as to each of the aggravating or mitigating circumstances enumerated in Sections 11 [§ 41-4711] and 12 [§ 41-4712] hereof and shall set forth in writing its conclusion:

(i) that sufficient aggravating circumstances (do or do not) exist beyond a reasonable doubt to justify a sentence of death;

(ii) that there are (or are not) sufficient mitigating circumstances to outweigh the aggravating circumstances.

(f) If the jury does not make the findings requiring the death sentence by unanimous verdict, the court shall impose sentence of life imprisonment without parole. [Acts 1973, No. 438, § 10, p. —.]

Section to Section Reference.

This section is referred to in § 41-4706.

41-4711. Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) the capital felony was committed by a person under sentence of imprisonment;

(b) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) the defendant in the commission of the capital felony knowingly created a great risk of death to one (1) or more persons in addition to the victim;

(d) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(e) the capital felony was committed for pecuniary gain; and

(f) the capital felony was committed for the purpose of disrupting or hindering the lawful exercise of any governmental function, political function or the enforcement of laws. [Acts 1973, No. 438, § 11, p. —.]

41-4712. Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) the capital felony was committed while the defendant was under extreme mental or emotional disturbance;

(b) the capital felony was committed while the defendant was acting under unusual pressures or influences, or under the domination of another person;

(c) the capital felony was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse;

(d) the youth of the defendant at the time of the commission of the capital felony; or

(e) the capital felony was committed by another person and the defendant was an accomplice or his participation relatively minor. [Acts 1973, No. 438, § 12, p. —.]

Section to Section References.

This section is referred to in §§ 41-4703, 41-4710.

41-4713. Review.—Nothing herein shall be construed to limit the powers of the Supreme Court to review and reverse the finding of guilt for errors of law, prejudice, insufficient evidence, or any other reason now permitted on review of convictions and sentences to life imprisonment. [Acts 1973, No. 438, § 13, p. —.]

41-4714. Commutations—Pardons—Reprieves—Rules and regulations—Applications.—Commutations, pardons, or reprieves by the Governor of any sentence of a person convicted of a capital felony or of a life felony without parole shall be granted, pursuant to Article 6, Section 18 of the Constitution of Arkansas, under the following rules and regulations:

(a) A copy of the application for pardon, reprieve, or commutation (hereinafter referred to as the application) of such sentence and/or convicted person shall be filed with the Secretary of State, the Attorney General, and the Prosecuting Attorney, Sheriff and Circuit Judge for the County in which the offense of the applicant was committed.

(b) The application setting forth the grounds upon which the pardon, reprieve, or commutation is asked shall be published for two (2) insertions in a newspaper of general circulation in the county in which the offense of the applicant was committed.

(c) On granting the application, the Governor shall include in his order a list of his reasons for granting the application and shall file a copy of his order and his reasons therefor with each house of the General Assembly, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve. [Acts 1973, No. 438, § 14, p. —.]

Compiler's Note.

The words enclosed in parentheses so appeared in the act.

Section to Section Reference.

This section is referred to in § 41-4707.

41-4715. Parole—Persons ineligible.—A person sentenced for a capital felony to life without parole or for a life felony without parole shall not be eligible for parole and shall not be paroled. [Acts 1973, No. 438, § 15, p. —.]

41-4716. Parole—Sentence commuted to term of years—Effect.—If a person sentenced to life without parole or for a life felony without parole has his sentence commuted by the Governor to a term of years, such person shall not be paroled, nor shall the length of his incarceration be reduced in any way to less than the full term of years specified in the order or commutation or in any subsequent orders of commutation. [Acts 1973, No. 438, § 16, p. —.]

Repealing Clause.

Section 18 of Acts 1973, No. 438 repealed all laws and parts of laws in conflict therewith.

Separability.

Section 17 of Acts 1973, No. 438, read: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."